



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Application of Ronald Welle for an After-the-Fact Permit to Place Riprap on the Shoreline of Loon Lake, Town of Almena, Barron County

Case No.: 3-NO-01-03142UC

Investigation on the Motion of the Department of Natural Resources of an Alleged Unlawful Placement of Riprap on the Shoreline of Loon Lake, Town of Almena, Barron County, by Mr. Ronald Welle

Case No. 3-NO-03-03031

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

With respect to case no. 3-NO-01-03142UC, on September 6, 2001, Ronald Welle filed an application with the Department of Natural Resources (Department) for an after-the-fact permit to place riprap on the shoreline of Loon Lake. The project is located in the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 5, T34N, R14W, Town of Almena, Brown County. On May 29, 2002, the Department issued Findings of Fact and Order denying the application. On June 27, 2002, the Department received a request for a contested case hearing pursuant to Wis. Stat. § 227.42, from Attorney Eve E. Ritter, on behalf of Mr. Welle. By letter dated July 18, 2002, the Department granted the request for a contested case hearing. On March 26, 2003, the Department filed a Request for Hearing with the Division of Hearings and Appeals.

With respect to case no. 3-NO-03-03031, the Department staff conducted field investigations and allege that Ronald Welle placed riprap on the bed of Loon Lake adjacent to property he owns located in the NW $\frac{1}{4}$ of the NE $\frac{1}{4}$ of Section 5, T34N, R14W, Town of Almena, Barron County, without a permit and in violation of Wis. Stat. § 30.12. The Department staff also alleges that the riprap interferes with the rights and interests of the public in Loon Lake. The Department staff further alleges that the actions by Mr. Welle constitute violations of Wis. Stat. § 30.12 and constitute a public nuisance pursuant to Wis. Stat. § 30.294.

Pursuant to due notice, the Division of Hearings and Appeals conducted a hearing in Rice Lake, Wisconsin on May 19, 2003. Mark J. Kaiser, Administrative Law Judge, presided.

In accordance with Wis. Stat. § 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Ronald and Patricia Welle, by

Attorney Eva E. Ritter
P. O. Box 25799
Woodbury, MN 55125

Wisconsin Department of Natural Resources, by

Attorney Charles R. Hammer
P. O. Box 7921
Madison, WI 53707-7921

Findings of Fact

1. Ronald and Patricia Welle (the Welles) own real property located in the NW ¼ of the NE ¼ of Section 5, T34N, R14W, Town of Almena, Barron County. The Welle property is located along the western shore of Loon Lake. The Welle property has 101 feet of frontage on Loon Lake. Loon Lake is a navigable body of water.

2. The Welles have owned the subject property for ten years. During this time, the Welles testified that erosion has occurred along their shoreline of their property. To prevent further erosion, in September 2001, the Welles began placing riprap on the bed of Loon Lake along their shoreline. The riprap was placed without a permit pursuant to Wis. Stat. § 30.12.

3. Phillip Dorn, a Department of Natural Resources conservation warden, observed the Welles placing riprap on the bed of Loon Lake. Warden Dorn stopped at the Welles' property and informed them that a permit pursuant to Wis. Stat. § 30.12 is required for the placement of riprap on the bed of a navigable body of water.

4. On September 4, 2001, the Welles filed an application for an after-the-fact permit to place riprap on the bed of Loon Lake with the Department of Natural Resources (Department). On May 29, 2002, the Department issued an order denying the application. The Department and the applicant have fulfilled all procedural requirements of Wis. Stat. §§ 30.12 and 30.02.

5. Shoreline erosion can be caused by various things, such as motor boat action, ice action, and freeze-thaw cycles. However, the primary cause of shoreline erosion is wind driven waves.

6. The erosive force of waves is a function of wave height. The Department, in the course of developing administrative rules for evaluating applications for shoreline protection, has developed a model to predict significant storm wave height for a particular shoreline. Daniel Harrington, the Department's water management specialist for Barron County, calculated the significant storm wave height for the Welle shoreline at .88 feet.

7. Heath Benike, the Department's fisheries biologist for Barron County, calculated the erosion intensity score for the Welle shoreline. The erosion intensity score analyzes the erosive force of waves and also looks at other causes of erosion at a site, such as the likelihood of the site being near navigational activity and the influence of adjacent structures, as well as evidence of past erosion at the site. The erosion intensity score calculated by Benike for the Welle shoreline is 28. Based on a significant storm wave height of .88 feet and an erosion intensity score of 28 the Welle shoreline is classified as a low energy shoreline. Low energy shorelines are generally not areas where erosion is occurring, but rather depositional or transitional areas.

8. Hard armor shoreline protection, such as riprap, results in loss of bank cover, loss of emergent plants, and loss of a portion of the littoral zone. These impacts result in a loss of habitat for small invertebrates and small fish. The loss of emergent vegetation also destabilizes lakebed sediment. The placement of riprap along a shoreline also impedes the ability of reptiles and amphibians to move between the land and water.

9. The loss of habitat for small invertebrates and small fish, the destabilization of sediment and the impediment to the movement of reptiles and amphibians resulting from the placement of riprap along the Welle shoreline constitutes a negative impact on the public interest in Loon Lake. The riprap placed by the Welles also negatively impacts the natural scenic beauty of this shoreline.

10. Consideration of an application for the placement of riprap requires a balancing of the negative impacts resulting from the placement of riprap with the interest of a riparian in protecting his shoreline from erosion. However, based on the Department's calculations that show the Welle's shoreline is a low energy shoreline with little risk of erosion, hard armor protection is not warranted at this site. The Department presented evidence of the existence of "soft" protection, such as natural coconut coir logs which are available and would provide adequate erosion protection for the Welle shoreline.

11. The negative impacts caused by the placement of riprap along the Welle shoreline may be relatively minor. However, the Wisconsin Supreme Court has held that the Department must consider the cumulative impacts of proposed projects. Hixon v. PSC, 32 Wis. 2d 608, 146 N.W. 2d 577 (1966). The cumulative impact of the riprap placed by the Welles on the bed of Loon Lake when considered with the impact of projects having similar impacts is significant.

12. The placement of riprap along the Welle shoreline will not constitute a material impairment to navigation.

13. The placement of riprap along the Welle shoreline will not increase water pollution in Loon Lake and will not cause environmental pollution as defined in Wis. Stat. § 283.01.

14. The Department has complied with the procedural requirements of Wis. Stat. § 1.11 and Wis. Admin. Code ch. NR 150, regarding assessment of environmental impact.

Discussion

The Welles did not present any evidence to refute the Department's analysis that their lakefront is a low energy shoreline. Their primary defense to the enforcement action is that they were told by Warden Dorn that they could complete the placement of the riprap on the bed of Loon Lake. A factual dispute exists regarding how much work was left to be completed at the time Warden Dorn visited the Welle property and what he told the Welles at the time he visited. However, the placement of riprap on the bed of a navigable body of water unquestionably requires a permit. Whatever Warden Dorn did or said can not be construed as the issuance of a permit.

The Welles also argue that the Department should be estopped from proceeding with this enforcement action because Warden Dorn told the Welles they could finish placing the riprap along their shoreline. However, even assuming that Warden Dorn expressly told the Welles they could complete the placement of the riprap along their shoreline, estoppel can not be used against the Department as a defense to this enforcement action. The principle is well established that estoppel is not available against governmental bodies when the governmental action involves a police power. In its opinion in Department of Revenue v. Moebius Printing Co., 89 Wis.2d 610, 279 N.W.2d 213 (1979), the Wisconsin Supreme Court commented:

We have not allowed estoppel to be invoked against the government when the application of the doctrine interferes with the police power for the protection of the public health, safety or general welfare. State v. Chippewa Cable Co., 21 Wis.2d 598, 608, 609, 124 N.W.2d 616 (1963); Park Bldg. Corp. v. Ind. Comm., 9 Wis.2d 78, 87, 88, 100 N.W.2d 571 (1960); Town of Richmond v. Murdock, 70 Wis.2d 642, 653, 654, 235 N.W.2d 497 (1975); McKenna v. State Highway Comm., 28 Wis.2d 179, 186, 135 N.W.2d 827 (1965); Milwaukee v. Milwaukee Amusement, Inc., 22 Wis.2d 240, 252-53, 125 N.W.2d 625 (1964).

89 Wis.2d 610, 639

The Department's regulation under Wis. Stat. ch. 30 involves a public interest in navigable waterways and as such is considered an application of police power. In its opinion in Just v. Marinette County, 56 Wis.2d 7, 201 N.W.2d 761 (1972), the Wisconsin Supreme Court found:

Wisconsin has long held that laws and regulations to prevent pollution and to protect the waters of this state from degradation are valid police-power enactments. State ex rel. Martin v. Juneau (1941), 238 Wis. 564, 300 N.W. 187; State ex rel. La Follette v. Reuter (1967), 33 Wis.2d 384, 147 N.W.2d 304; Reuter v. Department of Natural Resources (1969), 43 Wis.2d 272, 168 N.W.2d 860. The active public trust duty of the state of Wisconsin in respect to navigable waters requires the state not only to promote navigation but also to protect and preserve those waters for fishing, recreation, and scenic beauty. Muench v. Public Service Comm. (1952), 261 Wis. 492, 53 N.W.2d 514, 55 N.W.2d 40.

56 Wis.2d 7, at 18.

CONCLUSIONS OF LAW

1. Ronald and Patricia Welle are riparian owners within the meaning of Wis. Stat. § 30.12.
2. Placement of riprap on the bed of a navigable body of water requires a permit pursuant to Wis. Stat. § 30.12(3)(a)3.
3. The placement of riprap by the Welles on the bed of Loon Lake without a permit is a violation of Wis. Stat. §§ 30.12(3)(a)3 and 30.15(1)(d) and constitutes a public nuisance pursuant to Wis. Stat. § 30.294.
4. The placement of riprap by the Welles on the bed of Loon Lake is detrimental to the public interest in navigable waters and does not meet the requirements for a permit set forth at Wis. Stat. § 30.12(3)(b).
5. Pursuant to Wis. Admin. Code § NR 150.03(8)(f)4 the placement of riprap on the bed of a navigable body of water is a type IV action. Type IV actions do not require the preparation of a formal environmental impact assessment.
6. The following order is necessary to fully protect the interests of the public in Loon Lake.
7. Pursuant to Wis. Stat. §§ 30.02(4), 30.03(4) and 227.43(1)(b) the Division of Hearings and Appeals has the authority to issue the following order.

ORDER

The order of the Department dated May 29, 2002 denying the application of Ronald and Patricia Welle for an after the fact permit to place rock riprap on the bed of Loon Lake is affirmed. IT IS HEREBY ORDERED that within ninety days of the date of this order, the Welles shall remove the riprap that has been placed along their shoreline on the bed of Loon Lake.

Dated at Madison, Wisconsin on June 25, 2003.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: _____
MARK J. KAISER
ADMINISTRATIVE LAW JUDGE

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NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53 to insure strict compliance with all its requirements.

